

February 9, 1962
Letter Opinion 62-21-L

Mr. Howard Shelp
Right of Way Engineer
State Highway Department
206 South 17th Avenue
Phoenix, Arizona

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Re: Acquisition of necessary rights of
way for construction of Interstate
highway bridge over the Salt River

Dear Mr. Shelp:

Concerning the reference subject and your memorandum to me dated September 21, 1961, and our conference in my office yesterday, it is understood that your request for a formal Attorney General's Opinion (R-59) is withdrawn.

You may consider this request granted

You stated that a letter opinion covering the following question would be most satisfactory and the following is respectfully submitted:

Letter Opinion No. 62-21-L

Requested by: Howard Shelp

Question: Upon the recommendation of its Director, does the State Highway Commission have the power, under A.R.S. Section 18-106 and Section 18-155, to authorize the purchase by negotiation or condemnation of a 600 foot strip of land, parallel and adjacent to its highway right of way bridge site, for the protection of the bridge, wherein the title to said strip of land will exclude, and reserve to the former owners, the right to provide lateral support in and to the said 600 foot strip of land?

Conclusion: Yes

Reasoning: The Commission is delegated the responsibility for determining the nature, extent and necessity for the taking and use of real property for highway purposes. It is their responsibility and if they decide 600 foot zone without lateral support is sufficient - it is sufficient.

Our statute delegating responsibility to the Highway Commission is A.R.S. 18-155 A, which reads as follows:

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"The Commission in the name of the state, may acquire, either in fee or a lesser estate or interest, real property which it considers necessary for highway purposes, by purchase, donation, dedication, condemnation or other lawful means."

The Arizona Supreme Court in Mosher vs. City of Phoenix (1932), 39 Ariz. 470, 482, 7 P. 2d 622, held that once the legislature delegated administrative body has made its determination of necessity, that the matter is concluded.

"The next objection raised by appellant goes to the exclusion of three classes of evidence by the trial court. The first was evidence upon the question of whether or not the amount of land proposed to be taken was necessary for the widening of the street. The Court in our opinion, properly held that this was concluded by the legislative body of the city declaring the necessity." (See 1 Nichols on Eminent Domain 3rd Ed. 373 Sec. 4.11 for another good supporting statement.) (Also, see 18 Am. Jur. 734, "Eminent Domain" Sec. 107).

In 2 Nichols on Eminent Domain, 3rd Ed. 489 Sec. 7.512(2) is found this clear statement:

"Streets and highways are sometimes laid out by the legislature, or by its express commands, but ordinarily the power and duty of laying out public ways is delegated to the state superintendent of highways, the state superintendent of public works, the county commissioners, or the appropriate authorities of the various cities, towns and villages. Nothing is better settled than that under such circumstances the Courts have no jurisdiction to revise the discretion of the local authorities or to determine whether a way open to the public and laid out by the officials designated for the purpose is of sufficient public utility to constitute a public use."

Now the foregoing authorities stem from condemnation cases where necessity, public use, the plans or other item relating to the taking was challenged. I submit that they are useful to ascertain the power of the Commission under A.R.S. 18-155.

At this point, it should be noted that under our statutes A.R.S. 12-1116, the COURT finds as a fact necessity before immediate possession can be granted to the state. It appears, therefore, that in Arizona the Courts can, and do, review necessity, etc., and that it is a proper element for review. But even in those states which allow a review of necessity it is necessary for the property owner to prove affirmatively fraud, bad faith, abuse of discretion, no reasonable possibility of public use, etc., to set it aside. See New Jersey Highway Auth. vs. Curie, 35 N.J. Super 525, 114 A. 2 587; Tennessee Gas Transmission Co. vs. Hirschfield, 39 N.J. Super 286, 120 A 2 886; Virginia Elec. & Power Co. vs. Webb,

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abuse of discretion, no reasonable possibility of public use, etc., to set it aside. See New Jersey Highway Auth. vs. Curie, 35 N.J. Super 525, 114 A. 2 587; Tennessee Gas Transmission Co. vs. Hirschfield, 39 N.J. Super 286, 120 A 2 886; Virginia Elec. & Power Co. vs. Webb, 196 Va. 555, 84 S.E. 2nd 735; State vs. 0.62033 Acres (Del.) 110 A2 1, Affirm. 112 A 2 857; 18 Amer. Jur. 734, "Eminent Domain" Sec. 107, and, finally, 1 Nichols on Eminent Domain 3rd Ed. 377, Sec. 4.11(2). However, as we have seen in the Mosher case, supra, the Supreme Court "concludes" necessity by the act of the delegated administrative body. All of this adds up to the fact that it would be a very tough job indeed to get the Courts to interfere in the road building plans, specifications and decisions of the Highway Commission.

I think it is clear that the Commission could do nothing by condemnation that it was not empowered to do under A.R.S. 18-155 by negotiations and purchase. City of Scottsdale et al. vs. Municipal Court City of Tempe, No. 7431, Supreme Court January 31, 1962. Consequently, the Commission can, within its discretion determine to take a 600 foot buffer zone, abutting the bridge right of way, reserving to the former landowner the right of lateral support, by purchase or condemnation.

ROBERT W. PICKRELL
The Attorney General

WM. E. EUBANK
Assistant Attorney General

WEE:bg/dd